

5c-55

FAX

Date 11/30/2000

**Number of pages including
cover sheet** 8

TO: MS. Mindy Lubber
Regional Administrator
USEPA
Region I

FROM: Douglas J. Luckerman, Esq.
20 Outlook Drive
Lexington, MA 02421

Phone
Fax 617 918-1029

Email Dluckermanlaw
@aol.com
Phone 781 861-6535
Fax 781 652-8099

CC:

REMARKS: ☒ Urgent ☐ For your review ☐ Reply ASAP ☐ Please Comment

FYI Addendum to fax sent last week: Excerpts from the 1980 Senate testimony of Maine's Attorney General, Richard Cohen.

FAX**Date** 11/30/2000**Number of pages including
cover sheet** 7**TO:** Mr. Jeff Keohane
EPA OGC**Phone** 202564-5548
Fax Phone 202-5541**FROM:** Douglas J. Luckerman, Esq.
20 Outlook Drive
Lexington, MA 02421**Email** Dluckermanlaw
@aol.com
Phone 781 861-6535
Fax 781 652-8099**CC:****REMARKS:** ☒ Urgent ☐ For your review ☐ Reply ASAP ☐ Please Comment

Jeff, Attached please find the legislative history from the Senate Select Committee on Indian Affairs I referred to in my last fax. Please note on page 163, Richard Cohen, the Maine Attorney General testified that the Maliseet were included in the State settlement agreement only because they made a separate agreement with the Penobscot and the Passamaquoddy-for land and money. On pages 163 and 168 Cohen argues against amending the proposed Settlement Act to provide the Maliseet with federal recognition. He then declares on page 168 that if Congress should provide federal recognition to the Tribe "it could seriously jeopardize the entire proposed settlement." And that "[I]t would have to go back, certainly to the Maine legislature. As it turned out, Congress provided federal recognition to the Maliseet without further exception from the Maine legislature, Governor or Attorney General.

Furthermore, the question of what jurisdiction and rights were retained to the Tribe after federal recognition and the passage of the federal settlement act was also answered by Mr. Cohen testimony on page 168. The Maliseet had no agreement with the state limiting the Tribes jurisdiction or providing the state exclusive jurisdiction in any area at the time the settlement act was passed. Mr. Cohen was asked by Senator Cohen " So with respect to jurisdiction over criminal prosecution, it is in fact, the federal government and the tribes who now have exclusive jurisdiction in the area who are making a concession to the state, which as of this moment has no such jurisdiction. Is that correct?" "Mr. Cohen. That is totally correct." It would appear that the Maliseet have competent jurisdiction, at least equal to the state's, over their lands and territories. Let me know if you have any questions. Douglas Luckerman

dark green cover

The Proposed Settlement of Maine Indian Land Claims

Hearings before the Select
Committee on Indian Affairs

U. S. Senate

96th Congress on 52829-

July 1-2, 1970 Volume 1

Senator COHEN. I have one final point, Governor. This case presents some unique aspects, both in the terms of the settlement, and also in the creation of the status of tribes being considered as municipalities. If Congress should reject that notion, for whatever reasons advanced by the Secretary of the Interior, the Department of the Interior, or by Members of Congress, and say that this is an assumption of full Federal responsibility in terms of the payment in this case, and we are going to treat the Eastern tribes identically with the tribes in the West and apply Federal laws as they are applied to all tribes and cutting out no exception for Maine, what would be your reaction to that? Would you still propose a settlement of the case?

Governor BRENNAN. I would still urge a settlement as long as it is a settlement that does not unfairly damage innocent people in our State, but if there are substantial variations from what is proposed here, certainly the matter has to go back to the drawing board. After all, it has come this far by consensual agreement by representatives of the private parties, and representatives of the tribes. So, that which cannot pass here for some reason or another, I think, would have to go back for more discussion. I am not urging that at this time, but I am saying I think that is the only reasonable resolution.

Senator COHEN. What we are trying to do is anticipate what might happen, for example, with the competing jurisdictions of other committees. They may say: Wait a minute. Here is the State of Maine coming in. It may alter the CETA program or the revenue-sharing program by terms of the settlement, and we simply will not tolerate that.

If that is the case and they bring it back to us saying, "Gentlemen, we cannot accept it" is it your testimony that the State is willing to continue to negotiate settlement without this unique status if it runs into congressional opposition?

Governor BRENNAN. Yes, that is my testimony, because I think you have important responsibilities to consider the ramifications for other programs.

Senator COHEN. Thank you very much, Governor Brennan.

Senator MITCHELL. Thank you.

Governor BRENNAN. Thank you very much.

Senator COHEN. Our next witness is the Honorable Richard S. Cohen, the attorney general for the State of Maine. Since becoming attorney general, Mr. Cohen has been involved in several facets of the negotiating process and can provide information on several important points.

STATEMENT OF RICHARD S. COHEN, ATTORNEY GENERAL OF THE STATE OF MAINE, ACCOMPANIED BY JOHN PATTERSON, DEPUTY ATTORNEY GENERAL

Mr. COHEN. Thank you, Senator Cohen.

I am pleased to be here today to share with you my views on S. 2829 and to urge your enactment of this bill.

By now I expect you have had an opportunity to familiarize yourselves with the proposed settlement bill and the jurisdictional agreement previously adopted by the Legislature of the State of Maine and the members of the Passamaquoddy Tribe and Penobscot Nation.

While I would be happy to answer any questions about the bill before you or about the jurisdictional agreement between the State and tribes, I think it would be most useful to direct my initial remarks to explaining the history of this dispute, the method by which we negotiated the settlement, and the reasons why I think it is imperative that Congress approve it.

The lawsuit which we are attempting to settle has been characterized by the U.S. Justice Department as "potentially the most complex litigation ever brought in the Federal courts with social and economic impacts without precedent and incredible litigation costs to all parties." The case is based on a claim by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton band of Maliseet Indians that the land in Maine, originally possessed by them, was taken in violation of the Indian Trade and Intercourse Act. The Trade and Intercourse Act, which was originally enacted in 1790 and which has been a part of Federal law ever since, provides in essence that no one may acquire land from an Indian tribe without express congressional approval or ratification. The Passamaquoddy and Penobscots claim that Massachusetts, of which Maine was a district until 1820, acquired their lands through a series of allegedly illegal agreements in 1794, 1796, and 1818. The Penobscots also claim that Maine illegally purchased some land from them in 1833. Both tribes claim that these transactions were invalid only because they lacked this congressional approval. In no other respect are the transactions alleged to be illegal. The Maliseet Indians do not, so far as we know, look to any particular documents, but claim generally that their lands were taken from them through settlement by non-Indians. The size of the total area in question has never been precisely defined, but could involve most of the eastern half of Maine, including the St. John River Basin, but not including the immediate coastal areas of the State. In total size, the claim could encompass between 5 and 15 million acres or from 25 to 60 percent of the State. In addition, the claim has been estimated to potentially involve trespass damages of up to \$25 billion.

Chronologically, the land claims began in 1972 when the Passamaquoddy and Penobscots first requested the U.S. Department of Interior to sue the State of Maine on their behalf for recovery of the disputed lands. The Maliseets did not make a similar request to the Department in 1972, but have only recently raised their claim with the State. In response to the request of the Passamaquoddy Tribe and Penobscot Nation, the Department of Interior refused to bring the suit, arguing, rather, that since the United States had never recognized these Indians as tribes, the Indian Trade and Intercourse Act did not apply to them, and that, therefore, the United States had no trust responsibility with respect to those Indians. Thereafter the Passamaquoddy Tribe sued the Department of Interior in the U.S. district court, seeking a judicial declaration of such trust responsibility. The State of Maine intervened in the suit as a defendant along with the United States. That suit was known as *The Joint Tribal Council of the Passamaquoddy Tribe v. Rogers C. B. Morton, et al.*

At the same time that *Passamaquoddy v. Morton* was initiated, the tribes obtained a court order compelling the United States to sue Maine in order to toll the then-applicable statute of limitations. The

to the tribes. The tribes and their members will be eligible for and entitled to receive the same benefits and programs as other State citizens. In addition, the tribes will, in their new territories, have the same status as municipal governments and will be eligible for the same State subsidies that go to any municipality. The State of Maine is not simply washing its hands of Indians, either legally, financially, or morally.

I think it is also important to understand that this is not a bill designed to bail out the State of Maine from a situation created by the State of Maine. To the contrary, it is a bill designed to cure a problem created by the malfeasance and nonfeasance of the Federal Government. Since at least 1792 the Federal Government has consistently and unalterably taken the position that the Indians in Maine were a State, and not a Federal responsibility. For nearly 200 years the U.S. Government has lead the people of Maine to believe, by its words and deeds, that the State's entire course of dealing with the Maine tribes, including the land transactions now alleged to be illegal, have been entirely appropriate. I have many specific examples outlining these particular points in my remarks. I will not go into them right now, but will skip over them.

With respect to the cost of his settlement, I do not believe it is out of line with other major land claims settled by Congress or other proposals offered by this administration to settle this claim. The administration proposal of February 1978 had a value to the tribes of roughly \$90 million. The proposal of October 1978 had a value of about \$60 million. Comparing this bill to the recent Rhode Island settlement, the per acre cost is far less. The Rhode Island settlement provided for a Federal payment of about \$3.5 million to settle a claim of roughly 3,000 acres, or about \$1,160 per acre. In contrast, if we assume the Maine claim to be conservatively encompassing 5 million acres, the settlement in this case would work out to be about \$16 per acre. If we assume the Maine claim to be as large as 12.5 million acres the cost per acre is only \$7.50.

With respect to the size of the trust fund and the proposed acreage, I believe both those figures have been at least tacitly and now, I think this morning, expressly endorsed by the administration. The settlement proposal in February 1978, offered by the White House work group, which included the Solicitor of the Department of the Interior and a representative of the Office of Management and Budget, explicitly endorsed, of course, a trust fund to the tune of, I believe, \$27 million. That same report impliedly endorsed a tribal demand for a 300,000-acre land base. The figures in this bill, therefore, were not created out of whole cloth but could be fairly viewed as an expectation of the tribes that was created by the administration.

With respect to the value of the land, which averages \$180 per acre, the State did not participate in negotiating that figure. Since we believed that the sale of land should be from willing sellers at fair market value, I did not deem it appropriate for us to participate in those negotiations. I understand, however, that the Department of the Interior has reviewed the appraisals and is of the view that the average price of \$180 is a fair price.

Whether or not, of course, Congress thinks that \$81.5 million is an appropriate settlement for this claim is for Congress to decide. I

understand there are many competing demands on the budget and that you have an obligation to balance numerous competing interests. However, I have pledged to the tribes that I would support their request for a \$27 million trust fund and a 300,000-acre land base; and, consistent with that pledge, I would ask you to give careful consideration to these figures.

Finally, I should offer one final comment about the claim of the so-called Maliseet Band of Indians, since, if they have not already done so, they may request certain amendments to the bill to provide them with an exemption from State taxes, with certain limited sovereign immunity and with restraint on alienation of any land acquired by them. Recently this Indian group has asserted a claim to areas in northern Maine similar to that of the Passamaquoddies and Penobscots. The basis of their claim is, in my judgment, not meritorious. The Maliseets do not now exist as a tribe of Indians, nor have they existed as a tribe for many years. Accordingly, they cannot even meet the threshold test of the Trade and Intercourse Act.

Senator COHEN. Why are they included in this particular proposal?

Mr. COHEN. Out of the moneys that have been decided upon between the Passamaquoddies and the Penobscots, they have entered into an arrangement as to a portion of their moneys. That is something that we were not involved in that we do not object to. They could, I suppose, cause extended controversy in having this matter go on further in arguing over a variety of their claims. But that is why they are included; because of a specific agreement negotiated between the two other tribes and themselves to which the State was not a party.

The vast majority of Maliseets reside not in Maine but in Canada. For that reason the State has been unwilling to make any jurisdictional concessions to the Maliseets. The Interior Department does not even recognize them as a tribe or band, and we would find totally unacceptable any amendments which would grant special status to this group in any respect. While we have indicated to them our willingness to discuss this matter in the future, we do not think it appropriate that Congress grant them special rights and exemptions from State laws without specific State consent.

I have endeavored to set out for you the reasons why I strongly believe this settlement is both necessary and just. Before I conclude, however, I would ask that you consider this problem from another perspective which is neither strictly legal nor economic in nature. That perspective concerns the human relationship between Indians and non-Indians in the State of Maine.

If this case proceeds to litigation, there will be no winners. Even if the State were to successfully defend against the entire claim, a result about which there is reason, certainly, to have some doubts, the litigation alone would have catastrophic consequences. One seemingly inevitable result would be a legacy of bitterness between Indians and non-Indians which might take generations to overcome.

By contrast, the settlement before you is the result of a good-faith effort by both the State and the tribes to effect a reasonable resolution of their differences. I will not pretend that it was 13 months of amicable negotiations. There were indeed times when voices were raised, when threats were made, and when the prevailing mood was certainly

one of frustration. Nevertheless, even during the periods of greatest difficulty, both sides always returned to the table. The wisdom of resolving this matter short of war, albeit one fought in the courtroom, ultimately prevailed.

I cannot promise you that the adoption of this settlement will usher in a period of uninterrupted harmony between Indians and non-Indians in Maine. But I can tell you, however, that because we sat down at a conference table as equals and jointly determined our future relationship, in my view there exists between the State and the tribes a far greater mutual respect and understanding than has ever existed in the past in the State of Maine. I can also tell you that if this matter is litigated over a period of years, the atmosphere in Maine certainly will be quite different.

I cannot put a price tag on human relationships, nor am I suggesting that this factor alone justifies enactment of the legislation before you. I am asking only that you give appropriate consideration to the historical significance not only of the settlement itself, but also of the manner in which it was reached.

Thank you very much, Mr. Chairman.

Senator COHEN. Thank you, Mr. Attorney General. Let me ask you a couple of questions.

What is the level of spending currently in the fiscal 1980 budget for the State of Maine for the tribes?

Mr. COHEN. It is \$1.7 million, Senator—there is no budget right now. It would depend, I think, on what happened in Congress and what the level of Federal spending is through Interior as to the current recognition of the tribes.

Senator COHEN. You indicated you contemplated no reduction in the level of services. I was not clear on that point.

Mr. COHEN. No, I did not say there would be no reduction. I said there still would be obligation on the part of the State to provide things such as ADC and a variety of other programs.

Senator COHEN. Mr. Attorney General, let me ask you some questions about the Maine Implementing Act. It creates two kinds of Indian lands: Indian territory and Indian reservations. From my reading of this particular act, I have concluded that this distinction is for the purpose of distinguishing those areas where the tribes may assert criminal jurisdiction for class E crimes—juvenile offenses and so on—from those areas where it cannot. Is that the basis for the distinction?

Mr. COHEN. That is certainly one of the distinctions. The things that you mention, such as criminal jurisdiction, the tribal courts apply on the current reservations as contrasted to the newly acquired lands and how large they might be.

Senator COHEN. The tribes are empowered under the settlement to establish tribal forums where they can try those cases which fall under their jurisdiction. Some people have objected to this particular arrangement as being unworkable in that a decision whether a crime is a class E crime and within the tribes' jurisdiction or a class D crime, which is outside of the tribes' jurisdiction, would rest with the discretion of the prosecutor. Do you see any difficulties in drawing a distinction?

Mr. COHEN. I do not see, Mr. Chairman, any difficulty in that. The fact of the matter is—

Senator COHEN. Let me give you an example. If, for example, the tribes want to assert jurisdiction by saying they are going to try this

on a class D basis—if you were to reduce it down to a class E crime, would that then turn the jurisdiction over to the tribe? Would there be some competition between the tribes seeking to assert jurisdiction in that case where you have discretion as to whether you call it class D or class E?

Mr. COHEN. There is a possibility in certain situations, depending on the factual situation of concurrent jurisdiction. In other situations I could see where you might have a jeopardy situation to preclude one jurisdiction from taking action.

We discussed this at great length during the negotiations and consulted prosecutors and what have you. I really do not see a problem as far as competition or anything such as that. I do not see that as a practical problem.

The point I wanted to make, Mr. Chairman—of course currently, today, the State of Maine has no jurisdiction whatsoever to prosecute criminal offenses on any of the currently held Indian lands.

Senator COHEN. Is there any question that a class E crime committed by two Maine Indians on, let's say, Route 1 in the Indian Township—would that fall within the State's jurisdiction or the tribes'?

Mr. COHEN. Yes, Route 1 is entirely within the State's jurisdiction.

Senator COHEN. In section 6208(3) of the Maine Implementing Act it is provided that the Maine tribes, when acting in their "business capacity," will be subject to the laws of the State of Maine governing corporations and also be subject to taxation as such. Do you anticipate any difficulty in distinguishing between when the tribes are actually engaged in a business activity and when they are acting in a tribal capacity?

Mr. COHEN. I do not believe so. The same criteria would be used as when a government entity is working in a proprietary capacity. We discussed utilizing the same criteria.

Senator COHEN. You would use the same criteria that we now use as far as the Government acting in its own proprietary capacity?

Mr. COHEN. That is correct.

Senator COHEN. In the Federal legislation at section 6(d), the Congress gives its consent, in advance, for any amendment to the Maine Implementing Act which is made with the consent of the tribes. What kinds of amendments do you anticipate Congress is giving its consent to?

Mr. COHEN. As far as the Maine Implementing Act is concerned?

Senator COHEN. Yes.

Mr. COHEN. We had nothing specific in mind at this time—

Senator COHEN. Congress is going to want to know what kind of amendment—

Mr. COHEN. We talked about depending on how criminal jurisdiction works out or does not work out, and whether there could be a possible alteration as far as that goes, things of that type. We were just trying to create a mechanism that was workable and that could be effectuated.

Senator COHEN. But you are asking Congress in advance to give consent to amendments that may be offered at some time in the future by the State. I am just trying to find out what kind of amendments you are going to ask Congress for consent on.

MR. COHEN. It would only be to local relationships that affect the Indians and the State of Maine, specifically. They would not directly affect or have an impact on, certainly, the Federal Government.

Senator COHEN. Perhaps you could spell that out a little more specifically for the record because that question will be raised by many of our colleagues.

MR. COHEN. I will certainly do that.

Senator COHEN. Thank you. Without objection, the record will remain open for the purpose of inserting this additional information upon receipt.

[See letter dated August 8, 1980, from U.S. Department of the Interior, p. 95.]

Senator COHEN (continuing). The Federal act, at section 6(b) provides, among other things, that the Maine Implementing Act shall not be subject to 25 U.S.C. 1919. That section of the United States Code permits the States and Indian tribes to enter into agreements regarding the care and custody of Indian children. Am I correct in concluding that you do not feel this provision is necessary because it would have duplicated section 6209(D) of the Maine Implementing Act?

MR. COHEN. That is correct.

Senator COHEN. Is that the rationale for that?

MR. COHEN. That is correct.

Senator COHEN. Mr. Cohen, we have received a letter in which it was asserted that the proposed settlement would leave some title problems unresolved because of the continuing controversy in Maine over the public lots. Could you tell us to what degree this controversy affects the land under consideration for transfer to the Maine tribes?

MR. COHEN. There is a very small portion of acreage of public lots that are involved in any of the lands that are currently under consideration as far as the 300,000 acres are concerned. Wherever they are involved, of course, the grass and timber rights would be transferred. There is a current case pending in the State of Maine as to the ownership of the public lots and depending on how that case is decided would impact as to the public lots involved here.

Senator COHEN. How long do you anticipate the resolution of that particular litigation or controversy is going to last?

MR. COHEN. It has been orally argued in the Maine Supreme Court and is pending a decision right at the moment.

Senator COHEN. You don't propose going forward until that is resolved, finally?

MR. COHEN. No; if the State prevails in that particular case, the State would get back the grass and timber rights. If not, they will go on and people can sell them. So it will have no—as far as I see it—direct impact as far as needing any alterations to the settlement is concerned.

Senator COHEN. In their claims against the State of Maine, the tribes have asserted that their aboriginal title to the land was not properly extinguished by Congress. According to the U.S. Supreme Court decision in *Fletcher v. Peck*, the Thirteen Original States differ from the Western States in that, aboriginal title notwithstanding, the fee title to the land lies with the State. Do you agree that applies here?

Senator COHEN. If you follow that logically, aboriginal title has been described as a possessory interest alone and not an ownership right. It was characterized in a recent law review article as an "encumbrance on these lands in the nature of a life estate for the tribe's use and occupancy."

If the Maine tribes were to win their case in court, is this not the title to which they would succeed?

MR. COHEN. I have not read that article, but I understand it is in the nature of possessory interest and not fee simple.

Senator COHEN. In other words, the fee simple title would still reside with the State?

MR. COHEN. Yes; right; but for practical purposes, at least as I look at it, I think it would in effect be fee simple.

Senator COHEN. In other words, it is a possessory life estate that you would say is equivalent, for practical purposes in this case, to a fee title?

MR. COHEN. As far as affecting current landowners, businesses that are involved, municipalities, yes. That would be my feeling.

Senator COHEN. In section 4(a) (2) and (3) of the Federal legislation, the bill approves and ratifies all transfers of land or other natural resources as of the date they were made. This provision also states that those transfers will be deemed by the Congress to have been made in accordance with Maine State laws. The question I have is this: Why is it important that the Congress express an opinion on transfers that have occurred solely under the color of State law?

MR. COHEN. I will have Mr. Paterson comment on that.

MR. PATERSON. We were concerned that despite the fact Congress might extinguish any claim that existed under Federal law, since the U.S. Government would still have a continuing trust relationship with the tribes, they might very well be entitled in the future to bring a claim on their behalf under State—either statutory or common-law theory.

We therefore wanted to make certain that any claim on behalf of these tribes which arose under State law was similarly extinguished.

Senator COHEN. Let me turn now to the Maliseet question: Has the land which would make up that 5,000 acres to be held by the Maliseets been determined as of this time?

MR. COHEN. Not to my understanding. It is my understanding that they are going to get enough money to purchase the requisite number of acres. I do not know whether or not there has been any agreement arrived at specifically.

Senator COHEN. What is going to be the status of that land? Let's suppose, for example, that there is a nonpayment or default of payment of taxes; what happens? What is the mechanism at that point?

MR. COHEN. It would be absolutely similar to any other private property in the State of Maine, and it would be subject to foreclosure.

Senator COHEN. And taken by the State?

MR. COHEN. Yes.

Senator COHEN. Since you are using Federal funds to, in essence, purchase the 5,000 acres, do you think that under those circumstances the default that would then allow the land to revert to or be taken by the State is appropriate?

MR. COHEN. I think it is appropriate; yes. I do not think there should be any special considerations given here as far as to the United

States, not only in my remarks, but in other documents that were provided to the committee. I think that is the case with the small amount of land that is involved, given the United States creating this whole situation, as far as Maine is concerned, many years ago. I think, under the circumstances of trying to balance the interest, that is the best and most fair at which one could arrive.

Senator COHEN. I take it from your testimony that you do not really think the Maliseets qualify for relief under this particular bill, (1) because they are not a tribe, not a recognized tribe as such as the Passamaquoddies and Penobscots, and (2) because their case is thin or marginal at best. Nonetheless, since the Penobscots and the Passamaquoddies have entered into their separate arrangement with them, as far as you are concerned, you have no objection. Is that the basis for the settlement?

Mr. COHEN. That is correct.

Senator COHEN. If the Federal Government were to include that, since they are using Federal dollars to purchase this land, there should be some nature of a trust relationship with the Maliseets, would that endanger this particular settlement, in your opinion?

Mr. COHEN. I believe that it could seriously jeopardize the entire proposed settlement. It would have to go back, certainly, to the Maine legislators.

Senator COHEN. You mentioned that this settlement is not proposed as a model to be used elsewhere. The fact of the matter is, it will be used as a model elsewhere, where we have other disputed claims that will be coming before the Congress. They will point to the Maine settlement as a precedent saying, "Look what you have achieved here with a full Federal responsibility. We would like the same."

So, it will be pointed to for precedential impact. Second, you obviously intend to have it be used as a precedent because you have a unique situation in which you treat the tribes as municipalities. You want that as a model, do you not?

Mr. COHEN. I do not propose it as a precedent, but I think it could well be used. I agree. I think it is a unique and novel way or relationship, and I think it is something to be looked at by other States and by Congress.

Senator COHEN. But it is so unique that it may cost the Federal Treasury \$300 million.

Mr. COHEN. I am not sure that is the case. I see that portion just as Secretary Andrus was talking about; I think that should be analyzed.

Senator COHEN. But, if they come to the conclusion that, because of treating them as municipalities it will deal with tens, if not hundreds of other laws affecting municipalities, from revenue sharing to CETA programs and other types of intergovernmental relationships; if we find that this one situation is an exception, a unique innovation, as such, setting a model for the others to follow, which is going to cost the Federal Treasury considerably more than the \$81.5 million, and they were to come back and say that they cannot agree with that unique concept, that they are agreeing to full Federal responsibility for these claims to the tune of \$81.5 million, but that they were certainly in no position to open up the Federal Treasury to unforeseen or at least reasonably foreseeable contingent requests made upon the Federal Treasury which will cost hundreds of millions of dollars; in that case,

the Department of the Interior comes to that conclusion and says that they will agree to the settlement figure for the 300,000 acres of land with full Federal responsibility, but not with treating the Maine tribes like any other tribes throughout the country, what would be your position at that time?

Mr. COHEN. You are talking about a hypothetical case here.

Senator COHEN. I am talking about a very realistic possibility. Mr. COHEN. I do not know if anybody has analyzed that particular \$300 million amount—

Senator COHEN. What about our colleagues who sit on this committee or who represent significant populations of Indians in the West who ask why Maine should have a special status for its tribes, and that they should be treated like all Federal tribes, just like they are treated in the West?

Mr. COHEN. As I have indicated here today and further in my remarks in detail, I think the Maine situation is unique. I think the settlement is right for Maine. I think it is fair. I think it is fair as far as the Federal Government is concerned, and I do not think it is going to put a drain or set a precedent that is going to create a huge amount of funding that does not exist now.

Senator COHEN. The Federal Government is now assuming its rightful responsibility. They are Federal tribes. They should have been recognized as such. The Federal Government was wrong. It built on its beneficiaries' property over the years, the post offices, Federal buildings, et cetera. Now we recognize our wrongdoing as such, and we are going to assume full Federal responsibility of the tribes just like we have over every tribe in the country.

Now, at that point they send it back to you. What is going to be your position on that?

Mr. COHEN. Of course, it is not I alone that makes these decisions, and we will have to consult. I have an open mind. I recognize that this is not going to be in any sense rubberstamped. It is going to be scrutinized. I expected this. We expect very hard questions and having to make, very possibly, some very hard decisions.

Senator COHEN. Let me make this clear. I am asking these questions because they are going to be asked by other members of the committee at some later time. Assuming the matter comes out of this committee with a positive recommendation, it will go to the Appropriations Committee. Then they will ask these questions. Then, assuming it were to come out of the Appropriations Committee and go to the full Senate floor, you can be sure there will be debate on the Senate floor on these very issues. As my colleague Senator Mitchell indicated, we want to put this proposal to its full test before the committee to assure everybody that we are answering the questions that have to be analyzed.

Mr. COHEN. I certainly have an open mind as to these particular points and will seriously consider them and discuss them with other governmental leaders in the State.

Senator MITCHELL. Mr. Cohen, following up just briefly on the question of the Maliseets, do I understand your testimony to be that the inclusion of the Maliseet Band did not result in an increase in the total amount of the settlement?

Mr. COHEN. That is correct.

States, not only in my remarks, but in other documents that were provided to the committee. I think that is the case with the small amount of land that is involved, given the United States creating this whole situation, as far as Maine is concerned, many years ago. I think, under the circumstances of trying to balance the interest, that is the best and most fair at which one could arrive.

Senator COHEN. I take it from your testimony that you do not really think the Maliseets qualify for relief under this particular bill, (1) because they are not a tribe, not a recognized tribe as such as the Passamaquoddies and Penobscots, and (2) because their case is thin or marginal at best. Nonetheless, since the Penobscots and the Passamaquoddies have entered into their separate arrangement with them, as far as you are concerned, you have no objection. Is that the basis for the settlement?

Mr. COHEN. That is correct.

Senator COHEN. If the Federal Government were to include that, since they are using Federal dollars to purchase this land, there should be some nature of a trust relationship with the Maliseets, would that endanger this particular settlement, in your opinion?

Mr. COHEN. I believe that it could seriously jeopardize the entire proposed settlement. It would have to go back, certainly, to the Maine legislators.

Senator COHEN. You mentioned that this settlement is not proposed as a model to be used elsewhere. The fact of the matter is, it will be used as a model elsewhere, where we have other disputed claims that will be coming before the Congress. They will point to the Maine settlement as a precedent saying, "Look what you have achieved here with a full Federal responsibility. We would like the same."

So, it will be pointed to for precedential impact. Second, you obviously intend to have it be used as a precedent because you have a unique situation in which you treat the tribes as municipalities. You want that as a model, do you not?

Mr. COHEN. I do not propose it as a precedent, but I think it could well be used. I agree. I think it is a unique and novel way or relationship, and I think it is something to be looked at by other States and by Congress.

Senator COHEN. But it is so unique that it may cost the Federal Treasury \$300 million.

Mr. COHEN. I am not sure that is the case. I see that portion just as Secretary Andrus was talking about; I think that should be analyzed.

Senator COHEN. But, if they come to the conclusion that, because of treating them as municipalities it will deal with tens, if not hundreds of other laws affecting municipalities, from revenue sharing to CETA programs and other types of intergovernmental relationships; if we find that this one situation is an exception, a unique innovation as such, setting a model for the others to follow, which is going to cost the Federal Treasury considerably more than the \$81.5 million, and they were to come back and say that they cannot agree with that unique concept, that they are agreeing to full Federal responsibility for these claims to the tune of \$81.5 million, but that they were certainly in no position to open up the Federal Treasury to unforeseen or at least reasonably foreseeable contingent requests made upon the Federal Treasury which will cost hundreds of millions of dollars; in that case,

If the Department of the Interior comes to that conclusion and says that they will agree to the settlement figure for the 300,000 acres of land with full Federal responsibility, but not with treating the Maine tribes like any other tribes throughout the country, what would be your position at that time?

Mr. COHEN. You are talking about a hypothetical case here.

Senator COHEN. I am talking about a very realistic possibility.

Mr. COHEN. I do not know if anybody has analyzed that particular \$300 million amount—

Senator COHEN. What about our colleagues who sit on this committee or who represent significant populations of Indians in the West who ask why Maine should have a special status for its tribes, and that they should be treated like all Federal tribes, just like they are treated in the West?

Mr. COHEN. As I have indicated here today and further in my remarks in detail, I think the Maine situation is unique. I think the settlement is right for Maine. I think it is fair. I think it is fair as far as the Federal Government is concerned, and I do not think it is going to put a drain or set a precedent that is going to create a huge amount of funding that does not exist now.

Senator COHEN. The Federal Government is now assuming its rightful responsibility. They are Federal tribes. They should have been recognized as such. The Federal Government was wrong. It built on its beneficiaries' property over the years, the post offices, Federal buildings, et cetera. Now we recognize our wrongdoing as such, and we are going to assume full Federal responsibility of the tribes just like we have over every tribe in the country.

Now, at that point they send it back to you. What is going to be your position on that?

Mr. COHEN. Of course, it is not I alone that makes these decisions, and we will have to consult. I have an open mind. I recognize that this is not going to be in any sense rubberstamped. It is going to be scrutinized. I expected this. We expect very hard questions and having to make, very possibly, some very hard decisions.

Senator COHEN. Let me make this clear. I am asking these questions because they are going to be asked by other members of the committee at some later time. Assuming the matter comes out of this committee with a positive recommendation, it will go to the Appropriations Committee. Then they will ask these questions. Then, assuming it were to come out of the Appropriations Committee and go to the full Senate floor, you can be sure there will be debate on the Senate floor on these very issues. As my colleague Senator Mitchell indicated, we want to put this proposal to its full test before the committee to assure everybody that we are answering the questions that have to be analyzed.

Mr. COHEN. I certainly have an open mind as to these particular points and will seriously consider them and discuss them with other governmental leaders in the State.

Senator MITCHELL. Mr. Cohen, following up just briefly on the question of the Maliseets, do I understand your testimony to be that the inclusion of the Maliseet Band did not result in an increase in the total amount of the settlement?

Mr. COHEN. That is correct.

Senator MITCHELL. That is, the total amount was arrived at and then the Passamaquoddy and Penobscot agreed independently to make a portion of that total amount available to the Maliseet Band?

Mr. COHEN. That is correct. The 300,000-acre figure goes back and long before the Maliseets came into the picture and started talking with the Penobscots and the Passamaquoddies, yes.

Senator MITCHELL. I would like to also follow up on another theory that you touched on briefly. That is the area of criminal jurisdiction.

One of the criticisms widely heard in Maine is that the State is somehow giving up something in the area of criminal jurisdiction. As I understand your testimony, in fact, at the present time the State has no jurisdiction over criminal matters on the reservations or the areas in which these two tribes live. Is that correct?

Mr. COHEN. That is totally correct.

Senator MITCHELL. That is as a result of a decision of the Supreme Judicial Court of Maine?

Mr. COHEN. That is correct.

Senator MITCHELL. So, to the extent that the State through this settlement acquires some criminal jurisdiction, in fact, then, the State is gaining something through this settlement in the way of jurisdiction over criminal areas in the affected tribal areas. Is that correct?

Mr. COHEN. That is totally correct, Senator.

Senator MITCHELL. So with respect to jurisdiction over criminal prosecution, it is, in fact, the Federal Government and the tribes who now have exclusive jurisdiction in the area who are making a concession to the State which, as of this moment, has no such jurisdiction. Is that correct?

Mr. COHEN. That is totally correct.

Senator MITCHELL. You heard Secretary Andrus talk about the areas of concern, and his prepared text contains more than he referred to in his oral remarks. I assume that you, representing the State of Maine, are prepared to meet and talk with representatives of the Department of the Interior, as well as representatives of the tribes to work out some of these areas?

Mr. COHEN. Absolutely.

Senator MITCHELL. As I indicated in my questioning of Secretary Andrus, I am particularly concerned about the language on the extinguishment of the claims; that is, making certain that the very fundamental purpose of this legislation is dealt with in a manner that leaves no room for question as to its effect. Are you prepared to do that?

Mr. COHEN. Absolutely. This is uppermost in our minds, and we went through, I am sure, 40 or 50 drafts on language on just that point. We felt, and do feel, that it is clear now, but we are willing and want to sit down with anybody that has any questions to try to come to an agreement to work out these concerns.

Senator MITCHELL. You also heard me refer earlier to a series of questions raised about this whole negotiating process and the legislation now before us. The Governor has indicated that the State will provide a response. I assume you have seen these questions before, and since one of them—in fact, the very first one—deals directly with

you, although you did touch upon it in your remarks, I wonder if I could ask that question now. I will read the question and see if you can respond to it in a little bit more detail.

Why did the State attorney general agree to let the attorney for the timberland owners and the Indians establish the price tag to the settlement without his participation as spokesman for the State?

Mr. COHEN. Long before I became attorney general and back when Governor Longley was in office, at that time the State felt, and Governor Longley felt, it is my understanding, that since the land in question over a proposed settlement should be negotiated between willing sellers and willing buyers, that the State should not participate at all. The State did not participate going back at that time. And, as we went on through this, that policy continued on.

While we were kept apprised from time to time as to the status of the negotiations, we did not participate. They arrived at the particular price, and then the figures were provided for the Congress.

Senator MITCHELL. Notwithstanding your lack of participation, do you have an opinion as to whether or not the value arrived at is a fair and reasonable one under all the circumstances?

Mr. COHEN. From everything that I have been told by people knowledgeable in the area, the average price that has been arrived at is fair. I have heard nothing else. Again, people have relied here upon the James W. Sewall Co. This is the preeminent company in Maine that makes these determinations. I have heard nothing to the contrary that the prices we are talking about are fair.

There is some land, as you know, that is much less than \$180 per acre, and there is some land that is over that. That, of course, depending on which land ultimately comes out of this, could alter the total price.

Senator MITCHELL. By way of establishing the foundation for your view, does the Department of which you are the chief executive, that is, the Department of the Attorney General, engage in matters involving land in Maine, that is, legal matters, public lots, and other disputes involving land?

Mr. COHEN. On a sporadic basis, not on a regular basis. We have no type of expertise within my department to lend any particular light on this. We rely on other State agencies and private companies, where necessary, on specific matters.

Senator MITCHELL. Thank you very much for a very thoughtful prepared statement.

Senator COHEN. Just to clarify for me—you heard the Secretary of the Interior say that the Department was not contacted and was not actively involved in the final stages of the negotiations. Senator Mitchell asked you why the State was not involved as far as the price structure was concerned. But why was not the Department of the Interior involved in negotiating those particular sections that established this unique relationship as a municipality?

Mr. COHEN. Again, when I came into office as attorney general, it was made clear to me from several sources that it was up to the State